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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

CHHIN SAR et al.,

Plaintiffs and Respondents,

v.

EDWIN L. ONETO, JR.,

Defendant and Appellant.

C069562

(Super. Ct. No. 05AS05547)

Edwin L. Oneto, Jr., brings this judgment roll appeal from the superior court's order denying his motion to set aside a default judgment against him. We find no error and affirm.

BACKGROUND

Oneto has elected to proceed on a clerk's transcript (Cal. Rules of Court, rule 8.122); thus, the appellate record does not include a reporter's transcript of the hearing that gave rise to the order challenged in this appeal. This is referred to as a "judgment roll" appeal. (*Allen v. Toten* (1985) 172 Cal.App.3d 1079, 1082-1083; *Krueger v. Bank of America* (1983) 145 Cal.App.3d 204, 207.)

Given the meager state of the record on appeal, we summarize the relevant facts chiefly from the order which is the subject of Oneto's appeal.

Plaintiffs Chhin Sar and Sous Ka filed this personal injury action in 2005. Neither the original complaint nor any other complaint appear in the record on appeal.

The original summons and complaint misspelled Oneto's surname; the original complaint named Edwin L. Onetto, Jr., as a defendant. The proof of service nonetheless reflects that Oneto was personally served with the original complaint and summons on April 5, 2006, at his home located at 9921 Highway 88, Jackson.¹ Oneto apparently later challenged that service, asserting that his correct address is 9919 Highway 88, Jackson. But the trial court found that Oneto was "actually served, despite his attempt to evade service" inasmuch as the declaration of the process server reflects that the area is very rural, with rural mailboxes and long country roads, that the process server located Oneto by asking neighbors where he lived, and that he confirmed Oneto's identity when he personally spoke with Oneto and served him with the legal documents.

Later, plaintiffs realized the misspelling of Oneto's name, and a second amended complaint and summons with the correct

¹ We also accept the trial court's description of the proofs of service in this case, as neither appear in the record on appeal.

spelling was issued; it, too, was personally served on Oneto. Oneto never filed a responsive pleading.

In January 2007, the clerk entered Oneto's default and default judgment. Apparently and mistakenly believing that no summons on the second amended complaint had been issued with the correct spelling of Oneto's name, the superior court clerk applied for an order setting aside entry of the default judgment. Based on the clerk's application, the trial court (by Judge Loren McMaster) ordered the default and judgment vacated on May 6, 2008.

In June 2008, plaintiffs' attorney submitted an "attorney compliance statement" in anticipation of participating in a hearing by telephone conference, in which he indicated that all defendants had "answered or been defaulted." (Cal. Rules of Court, rule 3.670.)

On November 10, 2010, after considering "plaintiffs' written declarations and evidence" (which are not in the appellate record), Judge McMaster entered a default judgment in plaintiffs' favor against Oneto. In so doing, he found Oneto "was properly served with a copy of the summons and complaint"; because Oneto failed to answer or otherwise appear, his "default was entered upon plaintiffs' application on January 3, 2007."

Oneto then brought the instant motion pursuant to Code of Civil Procedure² section 473.5 to set aside the default judgment.

² Undesignated section references are to the Code of Civil Procedure.

He argued he was never properly served with the summons and complaint and had no actual notice of the proceeding because plaintiffs used an "incorrect address for all mailed notices" and the judgment's recitation that the clerk had entered his default in January 2007 was incorrect, because that default had been vacated on May 6, 2008. Oneto's attorney averred in support of the motion that he had mistakenly failed to check the court file and thus inadvertently failed to discover until March 2011 that the court had entered a default judgment against Oneto in November 2010. If plaintiffs filed a written opposition to the motion, it is not in the record on appeal.

All parties appeared (specially represented by counsel) and argued at the hearing on Oneto's motion to set aside the default judgment; no reporter's transcript of that hearing appears in the record on appeal.

The trial court (by Judge David Brown) denied Oneto's motion. It found that Oneto was personally served with the complaint and summons issued in connection with both the original and second amended complaint. Accordingly, Judge McMaster's May 6, 2008, order vacating the January 2007 default and default judgment was error, but "Judge McMaster subsequently signed a default Judgment against [Oneto] on Nov. 10, 2010, implicitly vacating his prior erroneous Order." The trial court also rejected Oneto's argument that the entry of the default judgment on the second amended complaint was caused by his attorney's inadvertence or mistake. Because Oneto had been personally served with the second amended complaint and summons,

he had actual notice of the action, and any failure by his attorney to check the court files to determine whether Oneto had been served did not cause Oneto's default or default judgment to be entered.

DISCUSSION

I

Standard Of Review

A judgment or order of the trial court is presumed to be correct, and all intendments and presumptions are indulged to support it on matters as to which the record is silent. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *In re Marriage of Gray* (2002) 103 Cal.App.4th 974, 977-978.) It is the appellant's burden to affirmatively demonstrate reversible error. (*Denham*, at p. 564; *In re Marriage of Gray*, at pp. 977-978.)

The appellant's burden includes: (1) providing an adequate record that affirmatively demonstrates error; (2) supporting all appellate arguments with legal analysis and appropriate citations to the material facts in the record; and (3) showing exactly how the error caused a miscarriage of justice, or else his or her contentions are deemed forfeited. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239-1240; *In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

Because Oneto has elected to proceed on a limited clerk's transcript -- with no transcript or settled statement of the hearing on his motion to set aside the default judgment -- we must treat this as an appeal on the "judgment roll," to which the following rules apply: "'Error must be affirmatively shown by the record and will not be presumed on appeal [citation]; the validity of the judgment on its face may be determined by looking only to the matters constituting part of the judgment roll [citation]; where no error appears on the face of a judgment roll record, all intendments and presumptions must be in support of the judgment [citation] [citation]; the sufficiency of the evidence to support the findings is not open to consideration by a reviewing court [citation]; and any condition of facts consistent with the validity of the judgment will be presumed to have existed rather than one which would defeat it.'" (*Ford v. State of California* (1981) 116 Cal.App.3d 507, 514, overruled on other grounds in *Duran v. Duran* (1983) 150 Cal.App.3d 176, 177-179; *Allen v. Toten, supra*, 172 Cal.App.3d at pp. 1082-1083; Cal. Rules of Court, rule 8.163.)

In sum, our review of a judgment roll appeal is limited to determining whether any error "appears on the face of the record." (*National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 521; Cal. Rules of Court, rule 8.163.)

II

Oneto Has Not Shown Reversible Error

With these rules in mind, we turn to Oneto's appeal from the order denying his motion to set aside the default judgment.

Section 473.5, subdivision (a) provides for setting aside a default judgment when service of the summons did not result in actual notice. It states in part: "When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. . . ."

"Discretionary relief based upon a lack of actual notice under section 473.5 empowers a court to grant relief from a default judgment where a valid service of summons has not resulted in actual notice to a party in time to defend the action. [Citations.] A party seeking relief under section 473.5 must provide an affidavit showing under oath that his or her lack of actual notice in time to defend was not caused by inexcusable neglect or avoidance of service. [Citations.]" (*Anastos v. Lee* (2004) 118 Cal.App.4th 1314, 1319, citing *Tunis v. Barrow* (1986) 184 Cal.App.3d 1069, 1077-1078 & § 473.5 subds. (a), (b).)

The moving party has the burden of showing good cause for relief from a default or a default judgment. (*Tunis v. Barrow*, *supra*, 184 Cal.App.3d at p. 1080.) But where, as here, the trial court has denied a motion for relief from default, "the

strong policy in favor of trial on the merits conflicts with the general rule of deference to the trial court's exercise of discretion'" and any doubts are resolved in favor of the application for relief from default. (*Id.* at p. 1079.)

Here, however, Oneto has not shown that the trial court erred in denying his motion to set aside the default judgment. Under section 473.5, a defendant's right to relief from a default judgment initially turns on whether he had actual notice of the action in which the judgment was entered against him, and Oneto submitted no declaration that he lacked actual notice of the lawsuit in time to defend against it. (*Anastos v. Lee, supra*, 118 Cal.App.4th at p. 1319.) Rather, in denying Oneto's motion, the trial court expressly found Oneto received actual notice of plaintiffs' lawsuit because he was personally served with both the original complaint and with the second amended complaint. As we have explained, on a judgment roll appeal, we necessarily presume that the evidence before the trial court supports its factual findings, absent evidence on the face of the record that they are erroneous (cf. *Ford v. State of California, supra*, 116 Cal.App.3d at p. 514) and nothing on the face of the limited record on appeal suggests the trial court erred in finding that Oneto was personally served with, and had actual notice of, both the original and the second amended complaint (cf. *National Secretarial Service, Inc. v. Froehlich, supra*, 210 Cal.App.3d at p. 521). Accordingly, Oneto's reliance on *Carr v. Kamins* (2007) 151 Cal.App.4th 929, in which the

defendant sought to set aside the default judgment because she was *not* personally served, is misplaced.

Nor does Oneto dispute on appeal that he was personally served and had actual notice of the action. Rather, he asserts that Judge McMaster entered his default judgment in 2010 based on plaintiffs' "false" representation in 2008 that all defendants had "answered or been defaulted." We disagree. Judge McMaster entered a default judgment in plaintiffs' favor against Oneto based upon his finding that Oneto had been "properly served with a copy of the summons and complaint" and yet failed to answer or otherwise appear. Even if we were to agree that this statement was false when made (because the clerk had erroneously caused the default to be vacated the previous month) nothing on the face of the judgment, or otherwise, suggests Judge McMaster relied upon it.

Finally, Oneto suggests on appeal, as he argued before Judge Brown, that Judge McMaster could not enter a default judgment after having set aside Oneto's default. To the extent this suggestion rises to the level of a contention, it lacks merit. Judge Brown found that the default should never have been set aside, and that Judge McMaster's subsequent entry of Oneto's default judgment "implicitly vacat[ed] his prior erroneous Order" setting aside the default; Oneto has not shown that Judge Brown's finding is erroneous. Moreover, although the statute governing the court's entry of a default judgment contemplates that a plaintiff may apply for entry of a default judgment after the clerk has entered the defendant's default for

failure to answer (§ 585, subd. (b)), the statute does not purport to limit the power of the court to enter a default judgment. Indeed, venerable case authority holds that "a formal entry of default need not be first made in order that the court shall have jurisdiction to enter judgment against a defaulting party." (*Wakefield v. Wakefield* (1911) 16 Cal.App. 113, 115, citing *Hibernia Savings and Loan Society v. Matthai* (1897) 116 Cal. 424, 426.)

DISPOSITION

The judgment is affirmed. Plaintiffs are awarded their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

ROBIE, J.

We concur:

RAYE, P. J.

BLEASE, J.